APPEAL NO. 040627
FILED APRIL 29, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on February 23, 2004. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) sustained a compensable injury in the form of repetitive trauma with a date of injury of _____, and that the appellant (self-insured) is not relieved of liability under Section 409.002 because the claimant timely notified her employer of her injury pursuant to Section 409.001. The self-insured appealed, disputing the hearing officer's determinations. The self-insured additionally appeals an evidentiary ruling made by the hearing officer. The claimant responded, urging affirmance.

DECISION

Affirmed.

We note that on April 1, 2004 (but effective February 24, 2004), an Order on Motion to Correct Clerical Error was signed, which modified the original decision and order of the hearing officer in this case changing Finding of Fact No. 7 to reflect that the date the claimant reported a work-related injury to her supervisor was May 5, 2003, rather than June 5, 2003.

The self-insured asserts that the hearing officer erred in excluding the medical report of the physician who performed a required medical examination (RME). The claimant objected to this admission at the CCH on the grounds that the report had not been timely exchanged. Parties must exchange documentary evidence with each other not later than 15 days after the benefit review conference and thereafter, as it becomes available. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c) (Rule 142.13(c)). The self-insured argued that the document was exchanged as soon as it was received. Our standard of review regarding the hearing officer's evidentiary rulings is one of abuse of discretion. Texas Workers' Compensation Commission Appeal No. 92165, decided June 5, 1992. To obtain reversal of a judgment based upon the hearing officer's abuse of discretion in the admission or exclusion of evidence, an appellant must first show that the admission or exclusion was in fact an abuse of discretion, and also that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Texas Workers' Compensation Commission Appeal No. 92241, decided July 24, 1992; *see also* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). In determining whether there has been an abuse of discretion, the Appeals Panel looks to see whether the hearing officer acted without reference to any guiding rules or principles. Texas Workers' Compensation Commission Appeal No. 951943, decided January 2, 1996; Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). We disagree with the self-insured's assertion that the present case shows no lack of due diligence in obtaining the RME report. The self-insured was not even able to

answer the question of when the RME exam was requested. Given the untimely exchange of the exhibit, we do not find the hearing officer's evidentiary ruling to be an abuse of discretion, as she acted with reference to guiding rules and principles. Nor did the self-insured establish that the exclusion of this evidence probably caused the rendition of an improper judgment.

The claimant testified that she worked over 22 years for the employer and that prior to May 15, 2002, when her job duties changed, she typed six to seven hours per day. The claimant additionally testified that subsequent to May 15, 2002, she typed three to four hours per day. The claimant contended that she sustained a compensable injury as the result of the repetitive activity performed in the course and scope of her employment. An occupational disease includes a repetitive trauma injury. Section 401.011(34). The claimant had the burden to prove that she sustained a repetitive trauma injury as defined by Section 401.011(36). The self-insured challenged the lack of findings concerning an occupational disease detailing repetitiveness, trauma, and how the claimant was more likely exposed to any of these conditions than the general public or in other forms of employment. In Texas Workers' Compensation Commission Appeal No. 961008, decided July 1, 1996, the Appeals Panel held that "it is not required that it be proven the disease is inherent in or present in a greater degree when the evidence sufficiently proves that repetitive traumatic activities occurred on the job and there is a causal link between the activities and the harm or injury." The hearing officer was persuaded by the claimant's testimony and the medical records that the claimant sustained an injury due to repetitive traumatic activities with her right hand/wrist over the course of time. The hearing officer could, and apparently did, find that the claimant established a casual link between the claimed occupational disease injury and her work activities. Conflicting evidence was presented on this disputed issue. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. Although there is conflicting evidence in this case, we conclude that the hearing officer's compensability determination is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

Section 409.001(a)(2) provides, in relevant part, that an employee or a person acting on the employee's behalf shall notify the employer of an injury not later than the 30th day after the date on which (in cases of an occupational disease) the employee knew or should have known that the injury may be related to the employment. Section 409.002 provides that failure to notify an employer as required by Section 409.001(a) relieves the employer and the employer's insurance carrier of liability unless the employer or the carrier has actual knowledge of the employee's injury, the Texas Workers' Compensation Commission determines that good cause exists for failure to provide notice in a timely manner, or the employer or the carrier does not contest the claim. Although disputed by the self-insured on appeal, the hearing officer specifically found that the claimant knew or should have known on _____, that her right

hand problems may be work related. There is sufficient evidence in the record to support the challenged finding.

Our review of the record reveals that the hearing officer's determination regarding timely notice is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to disturb the challenged determination on appeal. Cain, *supra*.

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **STATE OFFICE OF RISK MANAGEMENT (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

For service in person the address is:

RON JOSSELET, EXECUTIVE DIRECTOR
STATE OFFICE OF RISK MANAGEMENT
300 W. 15TH STREET
WILLIAM P. CLEMENTS, JR. STATE OFFICE BUILDING, 6TH FLOOR
AUSTIN, TEXAS 78701.

For service by mail the address is:

RON JOSSELET, EXECUTIVE DIRECTOR
STATE OFFICE OF RISK MANAGEMENT
P.O. BOX 13777
AUSTIN, TEXAS 78711-3777.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Robert W. Potts
Appeals Judge